Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	))	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rule Making to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	))))))	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)))	CC Docket No. 96-98
	)	
Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network	))))	CC Docket No. 88-57
____	_)	

INITIAL COMMENTS OF
RCN TELECOM SERVICES, INC., UTILICOM NETWORKS LLC AND
CAROLINA BROADBAND, INC.

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SUMMARY

Carolina BroadBand, Inc., RCN Telecom Services, Inc., and Utilicom Networks LLC, ("the Commenters") are pleased to submit these Joint Comments in response to the Commission's *First Report and Order and Further Notice of Proposed Rulemaking* in this important proceeding. As facilities-based providers of integrated bundled packages of advanced telecommunications services primarily intended for residential customers, the Commenters are on the front lines daily facing substantial barriers to competition in the residential multi-tenant environment ("MTE") market. The entrenched incumbent local exchange carriers ("ILECs") and incumbent cable providers frequently misuse their established positions to block competition through such means as exclusive contracts with MTE owners and managers. Among the casualties of such tactics are the MTE residents, who inevitably are denied choice in their electronic communication services, a choice which was the objective of the Telecommunications Act of 1996. These comments seek to emphasize that exclusive agreements impair competition and should be invalidated, whether they apply to telecommunications or cable television service.

What is being lost in the rush to sign exclusive contracts by MTE owners, telecommunications carriers, and cable providers, is stunning. Instead of having free access to the state-of-the-art facilities-based networks of new entrants, and instead of having the ability to obtain the fully integrated bundle of related services—telephony, high speed Internet access and broadband video—offered by one company, over one network, and on one bill, the MTE resident is forced to accept antiquated services, provisioned over less efficient networks, typically offered by the incumbent LEC and the incumbent franchised cable provider.

The Commenters urge the Commission to recognize the competitive obstacles raised by long term exclusive contracts in residential buildings, whether employed by an incumbent or any

other provider, and to take action to eliminate these barriers accordingly. The Commission is to be commended for taking the important first step in its new rules designed to prohibit, in any form and by whatever means, the use of exclusive contracts by telecommunications carriers in the commercial MTE market. These efforts will undoubtedly go a long way to opening the gates to competition in that selective market. For those few new entrants betting their competitive survival on having the opportunity to service the residential side of the telecommunications market, action by this Commission broadening the prohibition on exclusive contracts to include residential MTEs will surely play a large role in determining whether this important sector of the telecommunications market is to become truly open to full fledged competition as was intended by the Telecommunications Act of 1996.

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UTILICOM NETWORKS LLC

Carolina BroadBand, Inc. ("Carolina BroadBand"), RCN Telecom Services, Inc. ("RCN") and Utilicom Networks LLC ("Utilicom") (collectively referred to as "the Commenters"), by undersigned counsel, hereby submit these collective initial comments to the Commission's *Further Notice of Proposed Rulemaking* portion in the above-captioned proceeding.[1] RCN, Utilicom, and Carolina BroadBand are pleased to offer the Commission these

[1] *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets,* First Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 99-217 and CC Docket Nos. 96-98 and 88- (cont'd)

comments from the unique vantage point of facilities-based carriers seeking to serve residents within Multi-Tenant Environments ("MTEs").[2]

In this portion of the proceedings, the Commission seeks information and comment on a number of matters, including: the current state of the market for the provision of telecommunications services in residential MTEs; whether to extend the Commission's prohibition on exclusive access contracts in commercial buildings to include residential MTEs; whether the Commission should prohibit carriers from enforcing exclusive provisions in existing contracts in either commercial or residential MTEs or, alternatively, whether existing exclusive contracts involving residential MTEs should be opened up to "fresh look" opportunities or phased-out entirely, and if so under what arrangements; and, finally, whether the Commission has the statutory and constitutional authority to undertake such nondiscriminatory actions that effectively prohibit or limit the application of exclusive contracts in the residential MTE setting. These comments emphasize the importance of addressing the problem of exclusive agreements involving both cable and telecommunications carriers. The Commenters have a significant interest in such matters, and offer these comments to assist the Commission as it considers the appropriate role of regulation in aid of competition in residential MTEs.[3]

57, FCC 00-366, 2000 WL 1593327 (rel. Oct. 25, 2000) (*"Competitive Networks Report and Order"* or *"Competitive Networks FNPRM"*).

[2] Multi-dwelling units ("MDUs") is another term used to describe buildings in which multiple residents live. Throughout these comments the Commenters use the term "MTEs" to also denote the same entities commonly referred to as "MDUs."

[3] The Commenters refer the Commission to the "MTE Market Status Information" summary attached to these Joint Comments as *Exhibit A*. This summary provides an update on the state of the MTE market as requested by the Commission in its *Competitive Networks FNPRM* at ¶ 129.

I. INTRODUCTION

A. STATEMENT OF INTEREST OF UTILICOM, CAROLINA BROADBAND AND RCN.

The Commenters reflect a unique breed of new competitors in the telecommunications marketplace in a number of important and related respects. All three Commenters are actively constructing networks utilizing state-of-the-art fiber optic and hybrid fiber/coaxial cable facilities over some of the most advanced networks to be found anywhere. These entrants seek to serve principally the residential segment of the market. And, each of the Commenters joining in this combined statement share a formula for successful penetration into this important market. That formula is made up of the ability to offer residential customers the bundled provision of four categories of service -- video distribution services, high-speed Internet access, local exchange telephone and long distance telephone services—instead of the typical one or two services offered by the incumbent local exchange carriers ("LECs") and the incumbent cable service providers.

In a market characterized by economies of scale, video, Internet access and telephony service each produce an essential part of the necessary revenue stream. By bundling video services with broadband Internet access and local and long distance telephony, the carrier achieves great efficiency and is able to offer substantial discounts to customers. This mutually beneficial arrangement has the capacity to increase competitive penetration into the residential market, provided that the market remains open to competition and unimpeded by anti-competitive tactics by incumbents and others in the rapidly consolidating long distance and Internet service sectors of the industry.

The Commenters serve several regions of the country. RCN, a new entrant well known by the Commission, is focusing its efforts on first and second tier markets along the Boston to

Washington, D.C. corridor, the San Francisco to San Diego corridor in California, and the Chicago, Illinois, area.[4] Utilicom is targeting markets in Indiana, Ohio and Kentucky under the trade names SIGECOM and TOTALink, while Carolina BroadBand is devoted to serving residential markets in eight North Carolina and South Carolina cities.

The Commenters are at different stages in the development of a competitive presence in their respective regions, but each of their regional markets (irrespective of size) remains dominated by incumbent LECs and incumbent cable operators. These incumbents stubbornly and vigorously leverage their market power advantage to unfairly burden entry into their largely exclusive residential MTE customer base.[5] Anticompetitive measures have included, among other things, efforts to lock-up their existing MTE customer base into exclusive contracts, some with terms as long as fifteen years. When a substantial percentage of these prized high-density buildings are eliminated from the competitive arena through such exclusivity, the ability of new entrants to compete is destroyed, and the promise of choice to consumers, as contemplated by the Telecommunications Act of 1996 (the "1996 Act"), is lost. Accordingly, Utilicom, Carolina BroadBand and RCN have a serious interest in assisting the Commission with constructing its record on the state of the market for telecommunications services in residential MTEs, and in addressing the question of whether exclusive contracts should be prohibited or curtailed in some fashion.

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[4] In the Washington, D.C. area, RCN delivers services through an affiliate, Starpower Communications, LLC.

[5] Notably, in those markets where entrants have been actively competing against these incumbent providers, the incumbents have responded immediately to any competitive pressures by improving the delivery of their services, lowering or abandoning efforts at rate increases, offering bulk discounts to MTEs, or otherwise providing improved services. The Commenters have no quarrel with such legitimate competitive responses; indeed, that is the point of healthy competition.

II. DISCUSSION

A. INCUMBENT CABLE TELEVISION COMPANIES EMPLOY EXCLUSIVE BUILDING ACCESS AGREEMENTS TO OBSTRUCT COMPETITION.

1. <u>Comcast Use of Exclusive Contracts In Indianapolis, Indiana</u>.

As the following evidence reveals, Comcast's efforts to thwart competition with long-term exclusive agreements appear to be increasing even as the Commission considers banning such exclusive agreements in this proceeding. For example, less than one-month after the City of Indianapolis awarded a cable television franchise agreement to one of Utilicom's Indiana subsidiary (operating under the brand name TOTALink) and on the very same day the Commission released its findings in the *Competitive Networks Report and Order*, Comcast sent out a mass mailing to property owners and management companies controlling MTEs in Indianapolis, attaching a new 15-year exclusive service agreements for the owners and manager to sign immediately. A copy of Comcast's proposed agreement with Indianapolis building owners and managers, along with the cover letter, is attached to these comments as ***Exhibit B*** ("Comcast Exclusive Access Agreement").[6]

As is clear from the cover letter to the Comcast Exclusive Access Agreement, these new exclusive agreements are intended to replace expired building access agreements between Comcast and building owners/managers. The proposed contract calls for the owner to grant Comcast for fifteen years "the exclusive rights and licenses to construct, install, operate and maintain multi-channel video distribution facilities on the Premises (whether by cable, satellite, microwave or otherwise) and to deliver [such] Services to the Premises, unless otherwise

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[6] Letter from Kay'elen Perry of Comcast Cablevision of Indianapolis, Inc. to unidentified Property Owner/Management Company (Oct. 25, 2000), including a Service Agreement, of which page 6 of Exhibit B is missing ("Comcast Exclusive Access Agreement").

required by applicable law."[7] In return, Comcast offers to pay the owner/manager $75.00 for each resident apartment covered under the agreement between the date of the letter, October 25, 2000, and November 20, 2000.[8]

As indicated by Comcast in its cover letter to the proposed exclusive agreement, Comcast appears to be currently providing service in these buildings. Comcast's proposed service agreement recites in Section 1 that "[Comcast] has installed all facilities necessary to transmit the Services to the Premises," refuting any suggestion that new capital expenditures are being promised or anticipated. In fact, there is no indication in the Comcast Exclusive Access Agreement that the $75.00 per-resident-unit compensation fee offered to the property owner is for anything other than a reward for agreeing to keep competitors out.[9]

2. Time Warner Exclusive Contracts In Two Major Markets In North Carolina.

In market analysis of the Raleigh, area (including Orange, Durham and Wake counties) and the Charlotte area (Mecklenburg County) of North Carolina ("Surveyed Area"), Carolina BroadBand conducted a telephone and in-the-field survey of local MTE owners and managers, asking whether the owners would be interested in negotiating a service agreement for the provision of broadband services to their residents, or whether such owners have signed an exclusive agreement with Time Warner that would prohibit a competitor from offering broadband services to the residents of their buildings. An affidavit executed by the Carolina BroadBand employee in charge of this survey is attached to these Joint Comments as ***Exhibit C***.

[7] Comcast Exclusive Access Service Agreement, *Exhibit B* to these Joint Comments, at ¶ 3 & 7.

[8] Comcast Exclusive Access Agreement, *Exhibit B* to these Joint Comments, Cover Letter, at ¶ 13(g) and Exhibit B "Compensation Agreement."

[9] One can easily assume that the $75.00 per resident unit fee is compensation offered by Comcast in return for a 15-year right to be the exclusive provider of all video programming service to the residents of the buildings.

At this time, Carolina BroadBand has contacted twenty (20) of the largest MTE building owners and managers in the Surveyed Area, who together represent approximately 42% of the housing units of residential MTEs in this region.[10] Of the total number of housing units controlled by these owners and managers, approximately eighty percent (80%) of these housing units are forclosed to Carolina BroadBand and all other broadband competitors as per recent exclusive agreements signed with Time Warner.[11] The fact that eighty percent (80%) of the housing units within these residential MTEs controlled by the owners and managers contacted by Carolina BroadBand have entered into exclusive agreements with Time Warner portends an ominous result. Census data indicates that 27.5% of residents in the Surveyed Area live in MTEs. [12] It is evident that under Time Warner's vision of the future, most of them will be effectively locked out of a choice for broadband services. Unless steps are taken to invalidate existing exclusive contracts in residential MTEs in the Surveyed Area, Carolina BroadBand will be faced with the prospect of offering telephony service to many residential consumers without the opportunity to offer broadband services as part of the same package. Such an effort may be impossible.

From the evidence, it is clear that broadband competitors considering entering into the residential MTE market in the Surveyed Area face an unjust competitive hurdle to providing broadband services to residents living in MTEs. Most importantly, this segment of the market is comprised of the largest buildings with the largest number of tenants per building. These large buildings would be the most cost-effective venues for a start-up competitor to enter, because they

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[10] Affidavit of Douglas Gwaltney, *Exhibit C* to these Joint Comments.

[11] *Id.* The survey revealed that these exclusive contracts were entered into between 1997 and 2000 and most are for terms of ten (10) years.

[12] *See* Affidavit of Douglas Gwaltney, *Exhibit C* to these Joint Comments at 2. This 27.5% is quite similar to the nationwide 28% figure used by the Commission. *See Competitive Networks Report & Order* at ¶ 15.

offer a potential large source of subscribers who can be served over a relatively low cost building network. Although competitors such as the Commenters are not interested in serving large buildings exclusively, the complete removal of these MTEs from the addressable market is untenable.

B. TO COMPETE IN THE RESIDENTIAL MTE MARKET, A NEW ENTRANT MUST OFFER A COMPREHENSIVE ARRAY OF BUNDLED COMMUNICATIONS SERVICES.

In the residential marketplace, it is no longer possible to view competition between telephony, cable television and Internet access providers as separate and distinct. If allowed to compete head-on with the incumbent cable television and telephony providers, all three facilities-based Commenters believe their plans to offer bundled service over highly advanced networks have the greatest potential to bring competition at last to residential consumers. With the continuing convergence of cable, telephony and Internet services, the Commission's goal should be a uniform policy relating to them all.[13]

All three Commenters are building integrated advanced networks for the delivery of voice, video and broadband Internet access, rather than just the one or two services typically offered by the incumbent telephone company or cable franchisee. While the Commenters may be at different stages in the roll-out of their networks, the network architecture relied upon by each of the Commenters represents the most modern state-of-the-art fiber optic and hybrid fiber/coaxial cable facilities available. These networks are designed at once to compete against

[13] In a separate but related proceeding, the Commission is addressing the issue of whether to forbid or limit exclusive contracts for *video programming* in MDUs. *See Telecommunications Services Inside Wiring; Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring;* Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659, 3778-80, ¶¶ 258-266 (1997) ("*1997 Cable Inside Wiring Order*"). RCN has submitted comments in that proceeding and is pleased to supplement the record in the instant proceeding, together with Utilicom and Carolina BroadBand.

incumbent local exchange carriers ("ILECs") and cable companies, along with Internet service providers, who are not technically incumbents but are rapidly consolidating into market giants. In contrast to the entrance strategies of most competitive carriers, the Commenters all seek to serve principally the largely under-served but highly important residential market.[14]

As the Commission has recently recognized, there are substantial economies of scale involved in successfully reaching this under-served market.[15] A substantial and growing segment of our population resides in MTEs and MDUs. While the latest 2000 census information concerning the number of Americans residing in MTEs is not likely to be available until June 2001, the Commission has referenced the 1990 figures by pointing out that "approximately 28% of all housing units nationwide" are within MTEs.[16] Consumers who reside in MTEs can almost always be served with less capital investment than a solitary detached single family residence. It is almost always less expensive to provide a package of services over the same wire-based integrated network.[17] It is not surprising therefore that these residential MTE customers are highly prized, not only by new entrants seeking to gain an important foothold in this market, but by incumbents as well.

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[14] The Commission has recently recognized the multi-service strategy that carriers such as the Commenters have adopted to compete in the MTE market. As stated by the Commission, "[t]here is evidence that a wide variety of companies throughout the communications industries are attempting to become providers of multiple services, including data access." *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Seventh Annual Report,* CS Docket No. 00-132, ¶ 11 (2000) ("*Seventh Annual MVPD Report*").

[15] *Id.* at ¶ 128 (recognizing that RCN's business plan, for example, is "dependent upon delivering bundles of services thus generating multiple revenue streams and higher penetration rates... [by]… entering markets with high population densities, thus lowering the per customer cost of offering service").

[16] *Competitive Networks Report and Order* at ¶ 15.

[17] For example, RCN's bundled service offering, called Resilink,[SM] offers subscribers substantial discounts for subscribing to more than one service. On an a la carte basis, revenue per customer averages $88 per month. The full bundle, however, generates an average of $125 per month, and leads to the potential for greater penetration, where access is allowed to the building.

C. LONG TERM EXCLUSIVE MTE CONTRACTS ARE BARRIERS TO COMPETITION AND SHOULD BE PROHIBITED.

Entrenched incumbent providers are using long-term exclusive contracts to block entry by competitors. In the Competitive Networks FNPRM, the Commission concluded that the record to date did not provide a sufficient basis upon which to conclude whether exclusive contracting in residential MTEs is beneficial or detrimental to fostering growth in competition in the residential MTE market. Accordingly, the Commenters are eager to supplement the record in this regard with evidence establishing that exclusive agreements between property owners and providers of cable TV and telephony services are barriers to competition. There are many competitive obstacles raised by such exclusive arrangements, not the least of which is that the ultimate captive tenant must wait until the expiration of the contract before obtaining the superior services of another provider. Even then, it is possible that continued exclusive arrangements will prevent these consumers from choosing their own preferred telecommunications provider. A survey of the recent "from-the-field" examples faced by Utilicom, Carolina BroadBand and RCN highlights the insidious nature of the barriers-to-entry formed by such exclusive contracts.[18]

As discussed in these comments, incumbent cable providers such as Comcast and Time Warner have made concerted efforts to lock-up their MTE customers. These efforts have effectively preserved the entrenched position of these incumbent providers over a substantial percentage of the available MTE market.[19] Coming, as it does, just when residential competition

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[18] The Commission recently reiterated the potential for distortions caused by the use of exclusive contracts in residential MDUs. "For multiple dwelling units . . . potential entry may be discouraged or limited because an incumbent video programming distributor has a long-term and/or exclusive contract." *Seventh Annual MVPD Report* at ¶ 12.

[19] *See* Market Status Information, *Exhibit A* to these Joint Comments; Comcast Exclusive Access Agreement, *Exhibit B* to these Joint Comments; Douglas Gwaltney Affidavit, *Exhibit C* to these Joint Comments. In the Carolina markets where Carolina BroadBand is concentrating, Time Warner has obtained exclusive access to over 80% of the housing units surveyed (based on results for 42% of all residential MTEs in the Surveyed Area).

is emerging, the focus on exclusive agreements by incumbent cable companies seems intended to smother new entrants in their infancy.

The methods employed by Comcast in its recent solicitation of new exclusive agreements in Indianapolis are particularly revealing. The inducement offered by Comcast to the MTE owner comes in the form of a "bounty" payment "in the amount of $75.00 for every resident apartment covered under the agreement."[20] If the offer is accepted, a serious blow to competition is struck. The ultimate consumer who resides in the MTE is denied choice not just immediately, but for the next fifteen years, which is effectively forever in the fast-moving communications industry. In exchange for this burden on the rights of tenants, building owners and incumbents derive substantial benefits for themselves.[21] In the cases encountered by Utilicom's affiliate in Indianapolis, the incumbent Comcast has proposed a one-time payment of just $75.00 per residential unit for exclusivity, which converts to just $5.00 per year over a 15-year period. For as long as the exclusivity provisions are maintained in these buildings, Comcast can probably expect a significant number of customers and a low per-customer expense under the agreements. Accordingly, it would appear that tenants' rights of choice can be bought from landlords at fairly low cost.

Potentially, it might be argued that exclusive agreements are a benefit to residential service providers, allowing them to recover the costs of their fixed assets within the building. Comcast's proposed agreement to Indianapolis property owners shows that argument to be false. The Comcast letter clearly states that "[Comcast] has installed all facilities necessary to transmit

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[20] *See* Comcast Exclusive Access Agreement, *Exhibit B* to these Joint Comments.

[21] Even accepting *arguendo* data submitted by the Independent Cable Telecommunications Association, that it takes approximately five years to recover the infrastructure investment incurred in wiring an MTE, *see 1997 Cable Inside Wiring Order* at ¶ 259, n. 737, the effort by incumbent cable providers to *renew* expired contracts with MTE (cont'd)

[cable communication services] to the Premises."[22] Clearly, these are renewals of existing service arrangements, in buildings where facilities have already been installed, probably long ago. While the value of an exclusive agreement for recovery of infrastructure costs has an air of plausibility, the real motivating factor for incumbents is to foreclose competition. Furthermore, in a competitive market, cost recovery is not guaranteed and should not be protected through anti-competitive contracts, particularly when those contracts prevent the targeted consumers from choosing their own preferred telecommunications providers.

While RCN is making significant progress in its quest to compete head-on with the incumbent provider in all the regional MTE markets where RCN has networks in place, RCN still faces a difficult battle in reaching potential customers because these markets remain overwhelmingly dominated by franchised incumbent cable operators.[23]

Competition for incumbents often goes beyond lowering prices and improving services, which are the welcome forms of competition. For instance, in the Baltimore-Washington, D.C. region, where RCN's Starpower affiliate is actively expanding its competitive presence, exclusive arrangements between incumbent cable providers and the MTE owners and managers are confronted regularly, and hinder Starpower's progress in reaching its prospective customers. Such exclusive contracts, some applying to a landlord's entire portfolio of properties, are

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customers for additional terms of 15 years is strongly suggestive that anti-competitive motives outweigh a desire to recover costs.

[22] Comcast Exclusive Access Agreement, *Exhibit B* to these Joint Comments at ¶ 1.

[23] To name a few examples facing RCN, in Philadelphia, Comcast is the dominant multi-channel video programming distribution ("MVPD") provider, with 90% to 95% of the market under contract. RCN has every reason to believe that the same solicitation used by Comcast in the Indiana region is equally being deployed in East Coast Cities. In New York City, RCN faces Time Warner Cable, with some 1.3 million subscribers in the City (the same Time Warner Cable that has effectively locked up 80% of the surveyed market facing Carolina BroadBand) and Cablevision with some 1.7 million customers secured in the greater New York City region. Utilicom's TOTALink affiliates compete directly with Time Warner in Dayton, Ohio and in portions of Indianapolis, Indiana.

powerful and effective weapons that preserve a *status quo* for providers of outdated and overpriced network facilities.

The fact that incumbent cable providers and ILECs, together with many MTE owners, continue to defend the "status quo" through the use of exclusive contracts is unacceptable in the face of the Commission's mandate to ensure fair and open competition in the residential telecommunications market. As the Commission has recognized for many years, "incumbent LECs have little incentive to facilitate the ability of new entrants . . . to compete against them" and "thus, have little incentive to [act] in a manner that would provide efficient competitors with a meaningful opportunity to compete."[24] Incumbent cable television providers have no greater incentive to enhance competition. As in the past, the Commission is called upon to act boldly when confronted with former monopolies seeking to maintain their advantage.

As recognized by the Commission, when new entrants are locked out of residential MTEs by such exclusive arrangements, tenants "have limited recourse in addressing the lack of communications choices offered in buildings serviced under exclusive contracts."[25] In fact, there may be no recourse at all, because if exclusive agreements are allowed to continue, they may become universal in multi-tenant buildings. Moreover, an exclusive contract between the incumbent provider and the MTE owner for the provision of *any* one communications service—whether voice, video, or broadband communications, and by *any* media—whether wireline or wireless—will effectively foreclose the ability of a new facilities-based entrant to economically compete in this residential market. The reason for this cause and effect relationship is both

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[24] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, 11 FCC Rcd. 15499, ¶ 307 (1996), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC,* 117 F.3d 1068 (8th Cir. 1997), *aff'd in part, rev'd in part and remanded sub nom. AT&T Corp. v. Iowa Utilities Bd.,* 525 U.S. 366 (1999).

[25] *Competitive Networks FNPRM* at ¶ 162.

subtle and quite real. In order for facilities-based entrants to bring a real measure of competitive choice to this market, the entrant must be able to compete for the right to provide a full package of communications services over the same wires and network. A barrier to competition for even one type of service, as, for example, through an exclusive arrangement for the provision of cable television service, will effectively make it uneconomical for a new bundled service provider to compete in such a market for the provision of *any* service.

D. THE ENTRENCHED MARKET POWER OF INCUMBENT PROVIDERS REQUIRES IMMEDIATE COMMISSION ACTION TO PROHIBIT USE OF EXCLUSIVE CONTRACTS IN RESIDENTIAL MTES.

In its *Competitive Networks Report and Order*, the Commission noted that exclusive contracts between MTE owners and incumbent providers are a type of competitive restraint that has the potential to effectively "deter or foreclose entry to a market and thus harm consumers."[26] The examples described by Utilicom, RCN and Carolina BroadBand in these comments reveal vividly that this is exactly what is happening. Indeed, in its latest report on the state of the market for the delivery of MVPD services, the Commission once again remarked that the market for the delivery of video programming to households continues to be highly concentrated and characterized by substantial barriers to entry that increase the cost of potential entry into a rival's market.[27]

The current state of the residential MTE market, characterized by the tight grip maintained by dominant incumbent providers over its highly-prized MTE customer base, and the

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[26] *Competitive Networks Report and Order* at ¶ 29-31. The Supreme Court considers exclusive contracts an unreasonable restraint on trade when "a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (citing *Standard Oil v. United States*, 337 U.S. 293 (1949)). In the telecommunications context, exclusive contracts, when employed by companies with substantial market power, deny residents the ability to choose an alternative provider, thereby contravening the very purposes of the 1996 Act to promote customer choice and competition.

[27] *Seventh Annual MVPD Report* at ¶ 137.

misuse of exclusive contracts to prevent competitive entry, has led to a growing call for regulatory action by legal scholars alarmed at the lack of any appreciable competition in this local telecommunications market.[28] The combined experiences of Carolina BroadBand, RCN and Utilicom provide direct and relevant support to the concerns expressed by the Commission and these professors. The consequence of the misuse of market power through exclusive dealing arrangements is that new entrants, offering better services at more competitive prices, are effectively locked-out of these markets, and thus unable to gain the "critical mass" of customers necessary to truly challenge the dominant incumbents. Exclusive contracts "perpetuate the very barriers to facilities-based competition that the 1996 Act was designed to eliminate."[29]

The benefits to consumers that are lost can be substantial. RCN, for example, has constructed an advanced fiber network (referred to as Megaband™) that is one of the most technologically advanced networks being installed by any telecommunications company in the U.S. Only about 15% of the throughput capability of the network is required for services currently offered by the company. The remaining 85% is available for growth products, and can be expanded even further by upgrading the electronic equipment. The network incorporates SONET ring architecture and targets high density areas where MTEs are typically located. Such areas comprise 44% of the U.S. residential communications market spread over only 6% of its geography. The Commenters' nodes in residential markets service approximately 300 homes, with design potential to serve 150, as compared to the 5,000 homes per node on older cable

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28 *See, e.g.*, Bhagwat, *Unnatural Competition? Applying the New Antitrust Learning to Competition in the Local Exchange*, 50 Hastings L.J. 1479 (1999); Shapiro, *Exclusivity in Network Industries*, 7 Geo. Mason L. Rev. 673 (1999). These professors make the point that the current structure of local telecommunications markets make these markets particularly susceptible to effective, anti-competitive use of exclusive contracts, given the realities of a highly concentrated market, high barriers to entry, and the ubiquitous presence of dominant incumbents.

29 *See Competitive Networks Report and Order* at ¶ 35.

systems and the 500 per node on the so-called "upgraded" networks of incumbents. In most cases RCN's fiber is 900 feet or less from homes. Similarly, the RCN network delivers 45 mb of bandwidth, as compared with 1 mb for older cable plant and 11 mb for the newer cable upgrades.[30]

Similar technological advantages flow from customers who are able to obtain the bundle of services offered by Utilicom in smaller markets. SIGECOM, Utilicom's Evansville, Indiana affiliate, is representative of the advancements over the incumbent cable plant this company brings to the residential market. Utilicom's network architecture is made up of an office which houses all switches, servers, video processors, routers, and modems necessary to operate a completely bundled local network. The network delivers cable television, cable modem, and telephony services over the same infrastructure out of one office that serves both as Utilicom's cable "head-end" and telecommunications "central office." The network distribution transport component is a redundant SONET ring, while the "last mile" component consists of an Interactive Data Over Cable (IDOC) layout. Nodes in residential markets serve approximately 300 homes per node, while direct trunking or other arrangements are provided for larger customers. The advantages of such a network over the older network operated by the incumbent provider is enormous.

Carolina BroadBand also is building a state-of-the-art hybrid fiber/coax network, where the fiber is built to nodes that serve 75 to 200 homes, closer than any incumbent. This network will provide the most advanced cable services, including digital cable and video-on-demand

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30 ILEC provision of local fiber loops is extremely rare. And cable systems generally provide service over coaxial cable with a bandwidth of 550 MHz or less. The networks of all three Commenters are therefore vastly superior to traditional coaxial cable networks because they each contain switching architecture for telephony with fewer electronic components, are more easily maintained, and can be scaled to local demand instantly.

high-speed Internet access, and local and long distance telephone service, and will be capable of delivering data capacity 10 times greater (per subscriber) than an upgraded incumbent cable provider. The Carolina BroadBand network will also be "future-ready" in that it will be capable of delivering a broad array of net-generation services and features such as interactive and streaming media applications, and IP multicasting. Beyond the local delivery platform, Carolina BroadBand will be building a regional access and service provider network, allowing the company total control of network peering and traffic management, thus eliminating problems plaguing incumbent data networks. These network features will produce substantial improvements in customer satisfaction when using the services offered by Carolina BroadBand.

E. EXISTING EXCLUSIVE CONTRACTS IN MTES SHOULD BE PROHIBITED.

In its *Competitive Networks FNPRM*, the Commission asked for comments on whether to prohibit carriers from enforcing exclusive provisions in *existing* contracts in either commercial or residential MTEs.[31] In the alternative, the Commission asked for further comment on whether to phase-out existing provisions, and what would be an appropriate termination date in such cases.[32] As demonstrated by the examples cited above, the only equitable remedy to counter-act the weight of difficulties facing new entrants into markets dominated by incumbent providers is to ban exclusive contracts outright in all contexts, particularly given the ubiquitous presence of dominant incumbents who have an overwhelming incentive to misuse such exclusive arrangements.

In any event, it would be patently unfair to disallow *new* exclusive contracts without a corresponding limit on *existing* exclusive arrangements. This scenario would merely continue

[31] *Competitive Networks FNPRM* at ¶¶ 163-165.

[32] *Id*.

the current anti-competitive *status quo*, under which incumbent providers with secure exclusive access to MTEs could maintain their stranglehold on consumers while new, innovative competitors such as RCN, Utilicom and Carolina BroadBand must wait for exclusive contracts to expire, in some instances for as long as 15 years. Such distortions must be avoided at all costs.

The Commenters also have little faith in any proposal to allow MTE owners the opportunity of a "fresh look" at service options available from new entrants because competitive progress under a fresh look approach would require MTE owners to act in their tenants' best interest. However, the overwhelming existence of numerous exclusive agreements in the regions surveyed by the Commenters, combined with the continued aggressive efforts by incumbents to obtain such agreements in these regions, does not suggest that a "fresh look" approach will be in any way adequate to solve the problem.

More specifically, as demonstrated by the existence of numerous exclusive MTE agreements that effectively lock out competitors from these buildings, the incentives for building owners to enter into exclusive contracts serve only the interest of building owners and do not promote competition in the provision of telecommunications and broadband services. It is difficult to imagine that these incentives would suddenly change just because the owner is given the option of terminating such an agreement. Instead such a policy might only serve to increase the amount of payoff to owner for access to the tenants – hardly a worthwhile social purpose.

Accordingly, because the incentives for an owner to stay in exclusive MTE contracts would not change under a fresh look approach, such an approach would only serve to maintain the *status quo* under which competitive providers of telecommunications and broadband services are effectively locked out of a large segment of MTE market for long periods of time by long term exclusive contracts signed between building owners and incumbent providers. Thus, under a fresh look approach, it is more likely that numerous residential buildings would be locked out of the benefits of telecommunications and broadband competition until the expiration of the long term contracts. As previously described, such a result must be avoided by the Commission at all costs. Therefore, any fresh look approach which would allow building owners to remain in their exclusive contracts also should be avoided.

The Commenters take note of the Commission's inquiry into reducing the length of exclusive agreements, as an alternative to invalidating them entirely.[33] Such action is unnecessary, and would only extend the ill effects of exclusivity provisions. However, if the Commission concludes that some form of transition period is necessary, the Commenters suggest that the period should be short, and should be calculated from the date the exclusive provider's facilities were first installed in the building, and should not be renewable. There is no basis for allowing an exclusive agreement to be phased out from the date on which it was executed. A transitional period should be no more than three to five years.

Moreover, given that the Commission has initiated several proceedings to question the very existence of exclusive contracts in a modern competitive environment, any argument that the Commission should not disturb the "legitimate business expectations" that were formed when long-term exclusive deals were made simply falls short of the mark.[34] We respectfully suggest that there is nothing "legitimate" about the aggressive anti-competitive use of exclusive contracts; nor can it be said that incumbent LECs and incumbent franchised cable providers should be able to "expect" that regulators will do nothing about prohibiting exclusive contracts in the face of such compelling evidence of the significant harm caused to consumers by the

33 *Id.* at ¶ 164.

34 *See, e.g.*, comments summarized in the *1997 Cable Inside Wiring Order* at ¶ 259.

inability of new entrants to fairly compete for customers in this market. The fact remains that the strategic use of exclusive contracts by incumbent providers was undertaken with full knowledge that this Commission has been contemplating an outright ban on such arrangements. This high risk strategy flies in the face of any claim that there existed a legitimate investment-backed expectation that must remain inviolate in any rule-making that derives from this proceeding.

In sum, as long as incumbent providers remain capable of locking out competition through the use of exclusive contracts with MTE owners the progress and promise of full-scaled facilities-based competition in the residential MTE market will be inexorably retarded. It is time for the Commission to end this anti-competitive regime once and for all. To enable integrated service providers such as Utilicom, RCN and Carolina BroadBand to bring state-of-the-art competitive service to residential consumers, the Commission must prohibit the ability of incumbent providers of *any* telecommunications service to effectively foreclose competition for *all* services through an exclusive contractual arrangement with MTE owners and managers. This Commission has the legal authority to take corrective action, and act it must. Without such regulatory action there cannot be the kind of rapid "private sector deployment of advanced telecommunications and information technologies and services to *all* Americans" residing in MTEs, as compelled by the pro-competitive mandate of the Act.[35]

F. THE CONVERGENCE OF CABLE, BROADBAND AND TELEPHONY INTO ONE ENTITY REQUIRES ACTION TO PROHIBIT EXCLUSIVE CONTRACTS BETWEEN CABLE COMPANIES AND MTE OWNERS.

As the examples above vividly demonstrates, the widespread use, and misuse, of exclusive contracts at residential MTEs is largely the result of efforts by the incumbent cable

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[35] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. at 1 (1996) (emphasis added).

provider to lock up its existing clients in these buildings. However, since competitive carriers in the telecommunications industry, including the cable companies, are moving swiftly towards a convergence of a bundle of services—voice, video and other broadband services—the widespread use of exclusive contracts by cable companies has the potential to also block access to this important market for other competitors. The Commenters wish to clarify that, in their experience, the use by cable television providers of exclusive agreements to obstruct competition is as anticompetitive as, or worse than, the conduct of ILECs. In any event, as evidenced by the recently approved merger of Time Warner and AOL,[36] distinctions between the types of providers who have sufficient market power to obstruct competition are rapidly evaporating.

G. THE COMMISSION HAS AMPLE STATUTORY AUTHORITY TO ADDRESS THE BUILDING ACCESS BOTTLENECK BY PROHIBITING EXCLUSIVE RESIDENTIAL MTE AGREEMENTS.

In this proceeding, as many times before, due to the slow emergence of facilities-based competition in the telecommunications, cable and broadband markets, the Commission is being called on to adopt rules and policies to turn the competitive mandates of Title II and VI of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"), into a reality. The Commenters submit that the Commission has ample statutory authority pursuant to Section 4(i) and 303(r) of the Act, under which it can address the building access bottleneck by prohibiting exclusive residential MTE agreements.[37] A policy of prohibiting exclusive residential MTE contracts is not inconsistent with the Act, and, as shown in these comments, is necessary to bring facilities-based competition for telecommunications and broadband services to residents of such buildings.

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36 *See Subject to Conditions, Commission Approves Merger Between America Online, Inc. and Time Warner, Inc*., Public Notice, FCC 01-11 (rel. Jan. 11, 2001).

37 *See* 47 U.S.C. § 154 (i) and 303 (r).

Section 4(i) of the Act provides, in part, that the Commission may "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[38] This is a broad general authority to take those actions necessary to fulfill the mandate of the Act, even if such actions are not expressly prescribed by the Act. As the Commission stated when adopting its inside cable wiring rules, "[it] may properly take action under §4(i) even if such action is not expressly authorized by the Communications Act, so long the action is not expressly prohibited by the Act and is necessary to the effective performance of the Commission's functions."[39] Similarly, Section 303(r) provides the Commission with the authority to "make such rules and regulations and prescribe such restrictions such conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act."[40] In its recent decision interpreting the 1996 Act, the Supreme Court explained this broad authority of the Commission to promulgate those rules it deems necessary to effectuate the provisions of the Act, stating that the Act mandates that the "Commission may prescribe such rules and regulations as may be necessary to carry out the provisions of this Act."[41]

The Commission is not barred from implementing a policy that prohibits exclusive residential MTE contracts merely because Congress did not explicitly direct the Commission to do so. Congress cannot possibly foresee all potential problems in such a complex, developing industry. Rather, Congress has ensured that necessary action will be taken by the Commission to effectuate the provisions of the Act by giving the Commission broad powers to fulfill this

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38 47 U.S.C. § 154 (i).

39 *1997 Cable Inside Wiring Order* at ¶ 83.

40 47 U.S.C. § 303(r).

41 *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, n.5 (1999).

mandate. The Commission has consistently used its broad authority to promulgate necessary regulations in various unforeseen circumstances in order to effectuate the provisions of the Act and courts have consistently upheld such authority.[42] The Seventh Circuit, in fact, has explained that "Section 4(i) empowers the Commission to deal with the unforeseen – even if that means straying a little way beyond the apparent boundaries of the Act – to the extent necessary to regulate effectively those matters already within its boundaries."[43]

The Commenters submit that although there is no specific provision in the Act directing the Commission to adopt a policy that prohibits exclusive residential MTEs, such a policy is not prohibited by the Act and is, in fact, necessary to effectuate the competitive mandates of Title II and Title VI of the Act. Specifically, competition for broadband and telecommunications markets is impossible in situations where competitors are locked out of providing service to a residential MTE because the building owner has entered into an exclusive contract with a particular provider. Prohibiting exclusive contracts, thus, is necessary in order for the Commission to effectuate the competitive cable and telecommunications provisions of the Act. As stated throughout these comments, the prohibition of exclusive agreements must be extended to cable television providers, as well as telecommunications carriers.

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42 *See, e.g.*, *Mobile Communications Corp. v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 823 (1996) (confirming the Commission's authority to charge licensing fees to an applicant falling outside the class of applicants for which such a fee authority had been granted by Congress); *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert. denied*, 490 U.S. 1039 (1989) (confirming the Commission's imposition of a refund obligation on carriers for certain charges that produced revenue in excess of an authorized rate of return, even though the Act's only provision explicitly mentioning refunds did not apply to the circumstances).

43 *North American Telecommunications Association v. FCC*, 722 F.2d 1282, 1292 (7th Cir. 1985). In that case, the Commission, relying on Section 4(i), required the Bell holding companies to file capitalization plans for equipment subsidiaries, although the Act conferred no explicit authority over holding companies and the legislative history suggested that Congress had considered and rejected such authority.

H. IT IS IN THE PUBLIC INTEREST FOR THE COMMISSION TO PROHIBIT EXCLUSIVE AGREEMENTS IN THE RESIDENTIAL MTE MARKET.

It is well settled that "the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful and to modify other provisions of private contracts when necessary to serve the public interest."[44] Not only does the Commission have the power to modify provisions of existing contracts, but, as the FCC stated in the *Competitive Networks FNRPM*, it "has previously exercised its authority to modify provisions of private contracts when necessary to serve the public interest."[45]

For example, in 1992 the Commission allowed telephone subscribers with long-term access arrangement with the incumbent LEC an opportunity to terminate those agreements, without liability, and take advantage of competitive alternatives.[46] Similarly, in 1991 the Commission gave existing customers the option to terminate contracts for toll-free service, without penalty, for a period of time after 800 numbers became portable among service providers.[47]

In both of these cases, the Commission concluded that long-term customer contracts executed in a less than fully competitive environment raised anti-competitive concerns that could detrimentally impact the interests of consumers. For instance, in concluding that consumers should be allowed to terminate long-term access agreements, the Commission noted that "[t]he existence of certain long-term arrangements. . . raises potential anti-competitive concerns since

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44 *Western Union Telegraph Company v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987).

45 *Competitive Networks FNPRM* at ¶ 164.

46 *Expanded Interconnection with Local Telephone Facilities*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd. 7369, 7463-64 (1992), *aff'd* 8 FCC Rcd 7341, 7345 (1993) (*"1992 Access Order"*).

47 *Competition in the Interexchange Marketplace*, Report and Order, 6 FCC Rcd. 5880, 5905-06 (1991), *aff'd on recon.*, 7 FCC Rcd 2677 (1992).

they tend to 'lock-up' the access market, and prevent customers from obtaining the benefits of the new, more competitive interstate access environment."[48] The Commission similarly allowed the termination of existing long-term service contracts in the access and 800 toll-free markets because it was in the public interest to do so in order to address the potential anti-competitive effects of long-term exclusive contracts in these markets.[49]

Drawing on these commendable precedents, the Commission should now prohibit long-term exclusive contracts in the residential MTE market in order to avoid the potential anti-competitive effects resulting when new entrants are locked out of residential MTEs by long-term exclusive contracts signed by building owners and incumbent telephone and cable providers. It is contrary to the public interest for residents of MTEs to be denied the benefits of choice and competition among providers of broadband and telecommunications service because incumbent operators have sealed off their homes from competition through long-term exclusive contracts.

The potential anti-competitive effects of allowing long-term exclusive service agreements to be enforced in residential MTEs is clear and real. Exclusivity in residential MTEs allows building owners, to the detriment of their tenants, to choose a monopoly provider rather than allowing subscribers to choose among providers. The incentives to enter into exclusive contracts serve only the interest of building owners and the anticompetitive preferences of incumbents do not promote competition in the provision of telecommunications and broadband services. As previously described, most incumbent telecommunications and broadband providers installed their facilities in MTEs many years ago, and can be assumed to have recouped their costs. Some have recently entered into long-term exclusive agreements with residential building owners and

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48 *1992 Access Order* at 7463-64.

49 *Id.*

are pressing other owners to sign similar agreements. As a result, residents of these MTEs are locked out of service provided by competitive providers and, thus, are unable to choose providers or to avail themselves of the benefits of competition. Accordingly, the potential anti-competitive affects of long-term exclusive contracts in MTEs far outweigh the interests of building owners and incumbent providers to lock out potential competitors with long-term exclusive service agreements. It is in the public interest for the Commission to address these anti-competitive actions, and prohibit long-term exclusive contracts in the residential MTE market by means similar to the bold steps it has taken in the past to promote competitive markets.

I. THERE ARE NO CONSTITUTIONAL IMPEDIMENTS TO A RULE PROHIBITING EXCLUSIVE RESIDENTIAL AND COMMERCIAL MTE AGREEMENTS.

The Commission should not be deterred from taking action to address the anti-competitive behavior of incumbent telecommunications and broadband providers in the residential and commercial MTE market because Constitutional concerns have been raised by some entities. Although the Commission must be mindful of Constitutional issues raised in the context of its attempts to promulgate rules to fulfill the agency's statutory obligations under applicable law, the Commission should not decline to adopt a policy addressing important competitive issues merely because complex Constitutional issues are alleged to exist.

Moreover, most substantive changes in regulations have the potential effect of modifying existing contracts entered into by regulated entities. If the Commission were not allowed to issue regulations that have the effect of voiding existing contract provisions entered into by regulated entities, then the Commission's authority to promulgate regulations would be effectively trumped by the regulated entities themselves and their contractual decisions.

The Commenters express their firm support for the Commission's detailed analysis of Fifth Amendment "takings" case law, which concludes that placing obligations on telecommunications carriers in their dealings with property owners does not amount to a government taking because the FCC has not mandated a physical invasion of the owner's property.[50] Based on this analysis, the specific policy of prohibiting telecommunications and broadband providers from entering into exclusive contracts with MTE owners would not constitute a government taking under the Fifth Amendment because no physical invasion of the owner's property is mandated by such a policy.

J. INCUMBENT LECS DELAY AND OBSTRUCT CROSS-CONNECTING TO COMPETITORS' FACILITIES IN MTES.

Telecommunications carriers that intend to provide service in residential MTEs often need to cross-connect their wiring within buildings to the ILEC's telecommunications facilities. With due credit to the ILECs, this is a beneficial arrangement for the new entrants, enabled by an interconnection agreement and physically accomplished through cross-connects at the network interface point. However, it is impossible to complete these wiring connections in many buildings because existing in-house wiring provides for no single point of interconnection. In order to provide access to multiple providers, the ILECs' facilities typically need to be reconfigured utilizing a joint use access panel in which any service provider could complete a physical wiring connection from its facilities to the ILECs' in-house wiring. In many jurisdictions, because the up-grades must be performed on the ILECs' facilities, a competitive carrier must wait until the ILEC can engineer a wiring solution, send its technical support to the building, and upgrade its cross-connect facilities. New entrants, such as Utilicom, through its affiliates SIGECOM, have been held hostage to inordinate delays, in some cases for as long as

[50] *Competitive Networks FNPRM* at ¶ 144 (citing *Yee v. City of Escondido*, 503 U.S. 519 (1992)).

several months.[51] Also, the reliance on the ILEC's own scheduling puts competitors at a disadvantage, making it difficult for them to promise firm installation dates to their customers.

Moreover, ILECs presently demand that the competitive carrier pay for all the work necessary to make the building ready to allow for competitive access. This is a grossly unfair allocation of costs that in effect requires the first new entrant to subsidize both the ILEC and all other future competitive carriers who require access to the building. The Commission should end this anti-competitive practice and require that the ILEC: (a) reconfigure its intra-building wiring promptly; and (b) pay for all work necessary to upgrade its facilities.

If the ILEC is responsible for the provisioning, operation and maintenance of the cross-connect box in the building, it has that responsibility, either as a result of its ownership of the facility or as a result of its contract with the building owner. In either case, it has more than adequate opportunities to recover the costs on installing a single point of interconnection and cross-connect panel through its rates for telecommunications services to its retail customers, or its contractual arrangements with the building owners. Indeed, the ILEC continues to use these facilities for the provisioning of its own service to its own customers within the building, including the occasional circumstances in which service is switched back from the competitor to the ILEC. Therefore, the expenses incurred to make the building ready for competition should be borne by the ILEC.

To address similar issues, RCN has participated in a house and riser trial with the incumbent telephone provider, Verizon, in New York. Under the terms of this trial, RCN is responsible for the installation of its facilities in Verizon telephone closets. When RCN wins a

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[51] In many cases, the incumbent LECs' installation intervals are excessive, and appear aimed at obstructing a potential competitor. Utilicom has found that it typically must wait four to six months from a request for cross-
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new customer, RCN performs the cross-connect, from its facilities to Verizon's base and riser cabling. The trial has resolved many of the RCN the problems encountered by Utilicom's affiliates in Indiana and elsewhere, because it no longer experiences the costs and delay of having each cross-connect performed by a Verizon technician. RCN concurs with the other Commenters that making a building ready for competition is an improvement to house and riser wiring, and should be paid for by the wiring's owner, usually the ILEC.

III. SUMMARY OF RECOMMENDATIONS

To summarize, the Commenters respectfully submit that in order to effectuate the pro-competitive telecommunications and pro-consumer mandates of the Act, the Commission should prohibit all telecommunications, cable providers and wireless carriers from entering into exclusive residential MTE contracts.

More specifically, in these Joint Comments, the Commenters have provided the Commission with ample support for the proposition that competition for advanced telecommunications and cable services in the residential MTE market can become a reality. Carriers such as the Commenters are confident that they can effectively compete in the residential MTE market if they can provide these customers with a package of broadband Internet, cable and telephony services. Incumbent providers are using building-wide exclusive contracts to effectively keep other competitors such as the Commenters from entering into these buildings and, thus, preserve the bottleneck they have securely in place at these MTEs. Accordingly, the reality of competition in the residential MTE market can only be realized if the Commission stops incumbent telecommunications and cable providers from locking out

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connect installation in residential MTEs before such installation is completed in buildings where wiring is controlled by Ameritech.

competitors from residential MTEs by prohibiting such providers from executing long-term exclusive contracts with residential MTE owners.

The Commenters further submit that this prohibition should extend not only to future exclusive residential MTE contracts, but also those currently in existence. Allowing incumbents to enforce existing exclusive MTE provisions merely maintains the anti-competitive *status quo* under which incumbent providers have effectively locked out competitors from residential MTEs, for periods as long as 15 years. Likewise, incumbent providers could not have legitimately expected that regulators would do nothing about prohibiting exclusive contracts when such action is intended to prevent competitors and the competitive benefits of competition to reach consumers of residential MTEs. Thus, the elimination of all exclusive agreements in existence involving residential MTEs is the only way to ensure that facilities-based competition becomes a reality in this important market.

However, if the Commission concludes that a transition period for the phasing out of existing exclusive MTE contracts is necessary, the Commenters recommend that all existing exclusive contracts be terminated no more than three to five years from the date on which the incumbent provider first installed its facilities at the MTE. Renewals of exclusive agreements should not be permitted.

Once access is allowed, new entrants must be able to efficiently cross-connect with incumbent LECs' facilities, unimpeded by inordinate delays, staffing priorities and cost-shifting. The Commission should issue a rule mandating that upon request, the incumbent LEC must commence cross-connect installation within thirty days, and the costs incurred in making the MTE ready for competition should be borne by the ILEC.

IV. CONCLUSION

The Commenters commend the Commission's efforts in this proceeding to establish rules necessary to bring the competitive benefits of telecommunications and cable services to those consumers living in MTEs. Commenters urge the Commission to continue along this worthwhile path by prohibiting all exclusive contracts in the residential MTE market. Such a prohibition would be an invaluable tool with which competitors could penetrate the residential MTE market and finally, after too long a delay, bring the competitive benefits of high quality, low-priced broadband Internet, cable and telephony services to residents of MTEs.

Respectfully submitted,

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